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IN THE

Supreme Court of the United States

CARL GORDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, IL 60601
(312) 263-3700

Counsel for Petitioner

QUESTION PRESENTED

The federal illegal reentry statute makes it a crime for a previously-deported alien "at any time to be found in the United States." 8 U.S.C. § 1326(a)(2). The statute of limitations for noncapital federal offenses is five years. 18 U.S.C. § 3282(a).

Petitioner, who was previously deported, presented his own green card to immigration authorities at the San Ysidro, California port of entry in 1995. Although invalid, the green card contained his accurate identifying information. Authorities inspected Petitioner and admitted him into the United States. He was not indicted for being "found in" the United States until 2006. The Court of Appeals held that the indictment was timely because the government's constructive knowledge of an alien's illegal presence does not start the statute of limitations period.

The question presented is whether the five year statute of limitations for the crime of being "found in" the United States began to run in 1995 at the time that Petitioner announced his presence and true identity to immigration authorities at the border.

PARTIES TO THE PROCEEDING

Petitioner is Carl Gordon, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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Petitioner Carl Gordon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 16, 2008, can be found at 513 F.3d 659. (App. 1a.) The Court of Appeals' order denying petition for rehearing *en banc* is unreported and reproduced in the appendix. (App. 33a.) The U.S. District Court for the Northern District of Illinois issued its memorandum opinion and order on August 3, 2006. (App. 21a.)

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment and opinion issued on January 16, 2008, by the United States Court of Appeals for the Seventh Circuit. That court denied petitioner's request for a rehearing *en banc* in an order dated March 24, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1326(a) provides in relevant part that any alien who "(1) has been denied admission, excluded, deported, or removed . . . and thereafter (2) enters, attempts to enter, or is at any time found in, the United States [without the consent of the Attorney General] shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both."[1]

18 U.S.C. § 3282(a) provides in relevant part that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found

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[1] The statutory maximum penalty increases to 20 years if the alien was removed subsequent to an aggravated felony conviction. 18 U.S.C. § 1326(b)(2).

or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

This case involves the intersection of the federal illegal reentry statute, 8 U.S.C. § 1326, and the five-year federal statute of limitations for non-capital offenses, 18 U.S.C. § 3282. Specifically, it involves that portion of the federal illegal reentry statute making it a crime for an alien who has previously been deported "at any time to be found in the United States." 8 U.S.C. § 1326(a)(2).

This Court's review is necessary to address a split among the courts of appeals that the Court of Appeals for the Seventh Circuit created when it departed from the uniform holdings of five other circuit courts.

The unique conclusion of the Court of Appeals for the Seventh Circuit is that the offense of being "found in" the United States is a continuing offense that lasts as long as an illegal alien remains in the country, even when the government reasonably should know of the alien's illegal return. The court therefore held that the statute of limitations did not begin to run in this case when Petitioner presented himself to immigration authorities with a green card containing accurate identifying information. The court's conclusion effectively eliminates the statute of limitations in all "found in" prosecutions by essentially holding that nothing short of the government's decision to arrest or prosecute an offender will trigger the statute of limitations.

The five other courts of appeals to address the issue, by contrast, have held that the offense of being "found in" the United States is complete, and the statute of limitations is triggered, at an objectively determined point of discovery: the moment

immigration authorities know *or reasonably should know* that a previously deported alien has illegally reentered the United States. Unlike the law in the Seventh Circuit, the law in these five circuits is consistent with the plain language of the illegal reentry statute and the language of the statute of limitations. It also is consistent with the many holdings of this Court confirming that statutes are to be construed so as to serve the purposes of repose—prompt investigation of suspected criminal activity and protection from charges for conduct in the far-distant past—and that continuing offenses are disfavored. *See Toussie v. United States*, 397 U.S. 112, 114-15 (1970).

This Court's review is important because the crime in question is the second most prosecuted crime in the United States. Significant numbers of "found in" prosecutions are brought throughout the country and in all twelve geographic circuits. The question presented by this petition will thus continue to arise throughout the federal courts. The circuits' divergent interpretations of the statute will result in the inconsistent application of the law to the numerous defendants that are subject to it.

A. Factual Background

Petitioner Carl Gordon was deported from the United States in 1990 after he was convicted of a felony offense. He was returned to his native country of Belize. (App. 2a.)

In November 1995, Mr. Gordon returned to the United States through the official port of entry at San Ysidro, California. He arrived at the border in a car and presented immigration officials with his own authentic green card—a document bearing his true name, date of birth, photograph, alien registration

number, and fingerprint. The green card was invalid as a result of his previous deportation, but it had not been taken from him. (App. 2a.)

Mr. Gordon should have been turned away at the border because of his prior deportation. Immigration authorities had access to this information at the San Ysidro border crossing; INS border inspectors had a computer database and lookout book available at the border that would have identified Mr. Gordon as a previously deported alien without permission to reenter. Nevertheless, immigration officials looked at his green card, inspected Mr. Gordon, and admitted him into the United States.

On August 10, 2001, Mr. Gordon entered the custody of the Illinois Department of Corrections after being convicted of a burglary that took place the previous year. (*Id.*) The federal government claimed that it did not learn Mr. Gordon was illegally in the United States until April 21, 2006, when he was interviewed by an agent of the INS prior to his release from state prison. (App. 2a-3a.)

B. Trial Court

On May 9, 2006, nearly eleven years after Mr. Gordon identified himself to immigration authorities at the San Ysidro border crossing and entered the country, the United States Attorney's Office for the Northern District of Illinois filed an indictment charging Mr. Gordon with illegal reentry, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). (App. 3a.) The government alleged that Mr. Gordon, an alien who had been previously deported, had been found in the United States without having previously obtained the express consent of the Attorney General for reapplication for admission into the United States. (*Id.*)

Mr. Gordon moved to dismiss the indictment because it had been filed after the expiration of the five-year statute of limitations set forth in 18 U.S.C. § 3282. (*Id.*) Citing case law from five other circuits, he argued that the five-year period began to run on the date he presented himself at the border because immigration authorities, exercising the level of diligence typical of law enforcement authorities investigating the illegal presence of an alien, could have (and indeed, should have) discovered his crime at that time. Mr. Gordon argued that the indictment filed against him on May 9, 2006, nearly eleven years later, was therefore barred. (App. 3a-4a.)

The government conceded that the constructive knowledge test was the applicable legal standard and asserted that August 10, 2001, the date Mr. Gordon was admitted to prison in Illinois, was the controlling date for calculating the statute of limitations. According to the government, it *should have* been aware of his illegal presence in the United States when he was admitted to prison, but not when he presented himself to immigration authorities at the San Ysidro border crossing. Consequently, urged the government, the May 9, 2006 indictment was timely.

The district court denied the motion to dismiss without any oral argument and without a hearing. The district court admitted that it had no evidence of "what an ordinary border crossing event at San Ysidro entails," but took judicial notice of Bureau of Transportation statistics regarding the number of people who crossed the border at San Ysidro the year after Mr. Gordon entered, and concluded that the authorities did not "have the ability to check every seemingly legitimate document presented to them."

(App. 30a-31a.)[2] Therefore, the district court concluded, "the government had neither actual nor constructive knowledge of the defendant's illegal reentry into the United States in 1995 when he crossed the border." (App. 31a.)

Gordon then entered into a conditional guilty plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, reserving the right to appeal the denial of his motion to dismiss.

C. Court of Appeals

The Court of Appeals for the Seventh Circuit affirmed the decision of the district court but rejected the district court's discussion of the statute of limitations and effectively held that the crime of being found in the United States was not subject to the statute of limitations.

In particular, the court held that "[t]o be 'found in' the United States without permission after deportation means to be 'present in' the United States," and the immigration authority's "discovery" of an alien, "whether actual or constructive," is not an element of the offense. (App. 12a.) (*citing United States v. Are*, 498 F.3d 460, 466 (7th Cir. 2007)).[3] A deportee who has "reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected" and the "limitations clock does not run

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[2] The district court found that immigration authorities had access to a computer database that identified previously deported aliens at the border but did not discuss this fact when reaching its conclusion. (App. 29a.)

[3] While Mr. Gordon's case was on appeal, the Seventh Circuit addressed a similar challenge to an illegal reentry prosecution in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007). The statement of law set forth in this case was originally established in *Are*.

during this period because the deportee's crime continues; he remains illegally 'present in' the United States." (App. 12a.)

Despite reaching this conclusion, the court refused to abandon the idea that the statute of limitations could never apply to the "found in" offense, and added that the statute of limitations might possibly begin to run when immigration authorities "actually discover the illegal alien's presence" or when an alien turns himself in or is arrested. (App. 13a.) Either way, however, "constructive knowledge is irrelevant." (App. 14a.)

On the facts of this case, the court then concluded that the statute of limitations could not possibly have begun to run until April 21, 2006, when INS agents interviewed Mr. Gordon in state custody. (*Id.*) The court explained that the government did not have actual knowledge of Mr. Gordon's entry in November 1995 because his entry was "surreptitious." (App. 13a.)[4] Similarly, the court concluded that the statute of limitations did not begin on August 10, 2001, the date the government conceded it should have learned of Mr. Gordon's presence, because the government did not gain actual knowledge of Mr. Gordon's illegal presence that day either. It was irrelevant that the government would have gained knowledge of Mr. Gordon's presence "had standard procedures been followed." (App. 13a.)

In reaching these conclusions, the court openly

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[4] The Court of Appeals concluded that Gordon's entry was surreptitious because he knew his green card was invalid when he presented it at San Ysidro and because he did not disclose his prior deportation—not because he provided any false information about his identity. (App. 10a.)

rejected the unanimous holdings of five other courts of appeals and placed the law of the Seventh Circuit directly in conflict with those circuits. (App. 10a-11a.) The Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits all agree that the "found in" offense is complete the moment an alien is discovered, and that the statute of limitations begins to run when immigration authorities have either discovered, or should have discovered, his illegal presence in the United States. *See United States v. Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995); *United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) (*relying on United States v. DiSantillo*, 615 F.2d 128 (3d Cir. 1980); *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996); *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994); *United States v. Clarke*, 312 F.3d 1343, 1347-48 (11th Cir. 2002). Without reference to the language of either the generic five-year limitations statute or the "found in" clause of Section 1326, the Court of Appeals for the Seventh Circuit concluded that the law in these other circuits provides an improper incentive to illegal aliens to subtly fly under the government's radar and therefore should be rejected. (App. 11a-12a.)

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER A STATUTE OF LIMITATIONS FOR THE CRIME OF BEING "FOUND IN" THE UNITED STATES BEGINS TO RUN WHEN THE GOVERNMENT HAS CONSTRUCTIVE KNOWLEDGE OF AN ALIEN'S ILLEGAL PRESENCE IN THE COUNTRY.

The circuit courts are divided over the question of whether the government's constructive discovery of a previously deported alien completes the crime of being "found in" the United States for statute of limitations purposes. (App. 10a-12a.) The circuit conflict over the "found in" provision of 8 U.S.C. § 1326 presents a fundamental disagreement over the plain language of the illegal reentry statute and the language and purpose of the statute of limitations, and the volume of prosecutions brought under the statute throughout the United States necessitates clear direction from this Court.

The Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits have construed the illegal reentry statute as defining an offense that can, under certain circumstances, last for an extended period of time, but *not* one that lasts forever. These courts hold that the "found in" offense begins when an alien illegally crosses into the United States and is complete the moment an alien is "discovered" by law enforcement authorities. The moment of discovery is an objective determination. Discovery occurs when an alien's "physical presence is discovered and noted by the immigration authorities, and the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can

reasonably be attributed to the immigration authorities." *Santana-Castellano*, 74 F.3d at 598; *see also Rivera-Ventura,* 72 F.3d at 282; *DiSantillo*, 615 F.2d at 132; *Gomez*, 38 F.3d at 1037; *Clarke*, 312 F.3d at 1346-47. The statute of limitations for a "found in" violation begins to run "when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation." *Gomez*, 38 F.3d at 1037.

These circuits, therefore, have found that an alien can be "found in" the United States for statute of limitations purposes even though immigration authorities do not have *actual* knowledge of the alien's presence and illegal status in the United States. That is, *constructive* knowledge of an alien's illegal presence is sufficient to trigger the limitations period. *See, e.g.,Clarke*, 312 F.3d at 1346; *Santana-Castellano*, 74 F.3d at 597; *Rivera-Ventura*, 72 F.3d at 280; *Gomez*, 38 F.3d at 1037; *DiSantillo*, 615 F.2d at 135.

The Court of Appeals for the Seventh Circuit, in contrast, adopted two holdings that directly conflict with the precedent of its sister circuits, explicitly rejecting their reasoning. (App. 12a.)

First, the court held that the "found in" offense is a continuing offense that is not complete as long as an alien remains illegally present in the United States. A deportee who has "reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected" and the "limitations clock does not run during this period because the deportee's crime continues; he remains illegally 'present in' the United States." (*Id.*)

Second, the court held that to the extent the statute of limitations applies, it could not possibly be triggered until the subjective moment when immigration

authorities actually discover an alien's illegal presence, and may not begin until the point of arrest. (*Id.*) Either way, constructive knowledge of an alien's illegal presence in the United States is irrelevant to any calculation of the statute of limitations. (*Id.*)

The Court's guidance is necessary to ensure the consistent application of these statutes throughout the country. After drug offenses, illegal reentry has become the most frequently prosecuted federal offense in the United States.[5] More than 11,000 people were sentenced under the illegal reentry guideline in 2007, representing more than 15% of all federal cases.[6] Indeed, in some recent months, illegal reentry has been the most common lead charge in the country.[7] The number of illegal reentry prosecutions is increasing dramatically in non-border states as well as border states. In February 2008, Kansas and Iowa

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[5] U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007, Table 17: Offenders Sentenced for Each Chapter Two Guideline, available at http://www.ussc.gov/ANNRPT/2007/Table17.pdf (last visited June 13, 2008). The top five offense guidelines imposed in federal criminal cases last fiscal year were for drug offenses, U.S.S.G. § 2D1.1 (25,858 offenders), illegal reentry, U.S.S.G. § 2L1.2 (11,122 offenders), fraud or theft, U.S.S.G. § 2B1.1 (8,777 offenders), firearm offenses, U.S.S.G. § 2K2.1 (6,814 offenders), and alien smuggling, U.S.S.G. § 2L1.1 (3,464 offenders).

[6] *Id.*

[7] Statistics show that 8 U.S.C. § 1326 was the most frequent lead charge in federal court in February 2008 and June 2006. *See* http://trac.syr.edu/tracreports/bulletins/overall/ monthly feb08/fil/ and http://trac.syr.edu/tracreports/bulletins/ immigration/monthlyjun06 (visited June 3, 2008). These statistics also show that this was true in the year previous as well as five years previous.

were among the top ten jurisdictions for such cases.[8] The vast majority of prosecutions in non-border states are charges brought under the "found in" provision of 8 U.S.C. § 1326.[9]

The sheer volume of illegal reentry prosecutions throughout the United States exacerbates the existing circuit split and heightens the need for clear direction from the Court.

II. THE DECISION BELOW IS INCONSISTENT WITH THE PLAIN LANGUAGE OF 8 U.S.C. § 1326, DEPRIVES DEFENDANTS OF THE PROTECTION OF THE STATUTE OF LIMITATIONS, AND ENCOURAGES NEGLIGENCE BY LAW ENFORCEMENT.

This Court should adopt the correct and reasoned application of 8 U.S.C. § 1326, used by a majority of the circuit courts, that the "found in" illegal reentry offense is complete, and the statute of limitations begins to run, when the government knows or should know of an alien's illegal presence in the country.

The law in the Seventh Circuit effectively eliminates the statute of limitations for "found in" prosecutions because it essentially holds that nothing short of the government's decision to arrest or prosecute the offender will trigger the statute of limitations. Until that point, the government is free to overlook and condone the alien's illegal presence—without limitation—and thereby prolong the offense indefinitely. The crime can continue for as long as the

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[8] *Id.*

[9] A person also can be prosecuted for entering or attempting to enter the United States under 8 U.S.C. § 1326 in non-border states with international airports.

authorities choose not to enforce the law. This is true even under an actual knowledge standard: the government can prolong the crime by refusing to exercise reasonable diligence. The crime continues, if the authorities so choose, even if an alien presents himself to immigration authorities in the United States and openly identifies himself by name and alien number.

Few crimes have been so construed. In *Toussie v. United States*, 397 U.S. 112, 115 (1970), this Court addressed the "tension" between the continuing offense doctrine and the purpose of a statute of limitations and emphasized the importance of construing statutes, whenever possible, in a way that preserves a statute of limitations. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Id.* at 114. A statute of limitation "is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.* at 114-15. It also has the "salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Id.* at 115. For these reasons and others, "criminal limitations statutes are 'to be . . . liberally interpreted in favor of repose.'" *Id.* (internal citations omitted).

While *Toussie* left room for the possibility that certain crimes could be construed as continuing offenses that effectively eliminate the statute of limitations, those situations are permitted only when explicitly compelled by the language of the substantive

criminal statute or the nature of the crime "is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115. Neither situation applies here.

First, the language of 8 U.S.C. § 1326 does not compel the conclusion that illegal reentry is a continuing offense that lasts beyond the point of discovery. Congress knows how to define an offense as continuing when it wants to and, unlike some other statutes, Congress did not expressly define illegal reentry as a continuing offense. *See, e.g.*, 18 U.S.C. § 3284 (the crime of concealing a bankrupt's assets "shall be deemed to be a continuing offense . . . and the period of limitations shall not begin to run until such final discharge or denial of discharge.").

Moreover, there is nothing implicit in the words that Congress used when drafting the illegal reentry statute compelling the conclusion that the "found in" offense is a continuing offense. Courts give full effect to the plain meaning of statutory language whenever possible. *See Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 360-61 (1982). The common understanding of the phrase "found in" is "discovered"—an event that can be pinpointed to a particular moment in time—not "present" or some other word that implies an ongoing circumstance. *See, e.g.*, Merriam Webster's College Dictionary, Tenth Edition (1997) (definitions for the verb "find" include "encounter," "to come upon by searching or effort," and "to discover," but not "being in" or "present in" or any synonyms of those phrases); *see also United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) (holding that plain meaning of "found in" is "discovered" in the context of guideline culpability); *United States v. Hernandez*, 189 F.3d 785, 789 (9th

Cir. 1999) (same in context of venue); *United States v. Bencomo-Castillo*, 176 F.3d 1300, 1303 (10th Cir. 1999) (same in context of guideline culpability); *United States v. Meraz-Valeta*, 26 F.3d 992, 997 (10th Cir. 1994) (same in context of unconstitutional vagueness challenge); *United States v. Whittaker*, 99 F.2d 38, 42 (2d Cir. 1993) (same in context of guideline culpability).[10]

Thus, by the plain terms of the statute, the "found in" offense is a finite crime. It is complete at the moment the government discovers an alien's illegal presence, because an alien who is discovered in the United States is "found in" the United States. Discovery thereby triggers the statute of limitations and obligates the government to act within the limitations period. *See Toussie*, 397 U.S. at 115 (statutes of limitations begin to run when a crime is complete).

Second, the nature of the illegal reentry offense is not such that Congress must assuredly have intended to make Section 1326 a continuing offense. The crime is illegal "reentry" of removed aliens, not illegal "presence" of removed aliens. *See* 8 U.S.C. § 1326 (titled "Reentry of removed aliens"). The "at any time found in" provision was added solely to permit the prosecution of those who could not be captured at the border and prosecuted for entering or attempting to

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[10] The Seventh Circuit also reached the conclusion that "found in" means "discovered" in *United States v. Herrera-Ordones*, 190 F.3d 504, 510 (7th Cir. 1999). Seven years later, however, in *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 461 (7th Cir. 2006), the Seventh Circuit changed course, concluding that the "found in" discussion in *Herrera-Ordones* was dicta and was wrong.

enter the United States. *See United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (noting that Congress added the phrase "found in" to alleviate the problem of prosecuting aliens who enter in some surreptitious manner). That purpose is plainly served by delaying the limitations period for as long as the government does not know (or should not by reasonable diligence know) of an alien's illegal presence in the United States, but also by imposing the limitations period once the government actually or constructively obtains that knowledge.

Under a constructive knowledge standard, the government's interest in prosecuting immigration crimes is protected as long as it is diligently pursuing lawbreakers. Nothing in the statute requires the government to "exercise more than reasonable diligence in screening for previously deported aliens." *See, e.g., Bencomo-Castillo*, 176 F.3d at 1303-04 (the limitations period is not triggered for an alien who continues to successfully conceal his identity or presence within the United States by using an alias). Indeed, such a construction imposes no greater burden upon law enforcement than the burden that exists in nearly every other crime for which a statute of limitations applies.

At the same time, consistent with *Toussie*, the use of a constructive knowledge standard protects a defendant's ability to defend him or herself against charges when facts and witnesses necessary to a defense remain available. It is a defense to illegal reentry to show that an alien's prior deportation was fundamentally unfair, *see United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) and 8 U.S.C. § 1326(d), and evidence of a previous deportation proceeding or the unfairness of any underlying allegation can disappear

with time. It may also be a defense—requiring evidence that can disappear with time—to show that an alien obtained proper permission to return to the United States, that a person is, in fact, a citizen of the United States (e.g., by virtue of derivative citizenship because of a grandparent's grant of amnesty or service in the military), or that an alien left the United States voluntarily (as opposed to being deported or removed). The objective, constructive knowledge standard of the Second, Third, Fifth, Eighth, and Eleventh Circuits means that an alien can conclude his offense, on his own, by revealing his presence and identity to law enforcement authorities, and preserve his basic interest in repose.

In this case, immigration officials had constructive knowledge that Mr. Gordon was present in the United States when he provided accurate identifying information at the San Ysidro border, including his name, date of birth, alien registration number, photograph, and fingerprint. Indeed, it is hard to imagine what additional information Mr. Gordon could have presented to immigration authorities that would have better notified the government of his illegal presence, particularly when those immigration authorities had access to a computer database specifically designed to verify the status of aliens entering the United States. For these reasons, he was "found in" the United States, his crime was complete, and the limitations period triggered in November 1995. While the government can still deport Mr. Gordon from the United States, its May 9, 2006 prosecution is barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, IL 60601
(312) 263-3700

June 23, 2008

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1714

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL GORDON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 06 CR 334–Ronald A. Guzman, *Judge*.

Argued Nov. 30, 2007
Decided Jan. 16, 2008

Before BAUER, RIPPLE, and KANNE, Circuit Judges.

BAUER, Circuit Judge.

Defendant-Appellant Carl Gordon is a citizen of Belize who lawfully entered the United States in 1974. Gordon obtained permanent resident status and was issued a "green card." Ten years later, Gordon committed a series of home invasion

robberies, targeting elderly women alone in their homes. In March of 1985, a Cook County grand jury indicted Gordon on multiple charges, including home invasion, residential burglary, armed robbery, robbery, aggravated battery, and theft. Gordon was found guilty of several of these charges and was sentenced to concurrent ten and seven year terms in the custody of the Illinois Department of Corrections. On January 3, 1990, Gordon was deported based on those convictions. Before he was deported, an immigration judge explained to Gordon that he no longer was a legal permanent resident and provided him with an I-294 form, which explained that he needed permission from the Attorney General to return to the United States.

Gordon returned to the United States in November of 1995 without obtaining permission from the Attorney General. The exact date of Gordon's return is uncertain, but on appeal, Gordon asserts that it was sometime during November of 1995. Gordon reentered via Mexico at the San Ysidro, California border checkpoint. At that checkpoint, Gordon presented his green card-which was still in his possession despite his deportation to the Immigration and Customs Enforcement agent and was allowed to reenter the United States.

On October 12, 2000, Gordon was again arrested on charges of home invasion and armed robbery of an elderly woman. On August 8, 2001, he was convicted of these crimes in Illinois state court and sentenced to twelve years' imprisonment. On August 10, 2001, Gordon entered the custody of the Illinois Department of Corrections to begin serving his sentence. Standard custodial procedures should

have alerted the government to Gordon's unlawful presence at this time, but standard procedures, for some unknown reason, were not followed in this case.

On April 21, 2006, Gordon was interviewed by an Immigration and Customs Enforcement agent, and he admitted to the agent that he had illegally reentered the United States by presenting his authentic but invalid green card to the inspector at the border. With this green card, Gordon falsely represented that he was a lawful permanent resident of the United States.

On May 9, 2006, Gordon was indicted on charges of being a deported alien illegally present and found in the United States without the express consent of the Attorney General, in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). This offense has a five-year statute of limitations period from the time the offense is complete. On June 27, 2006, Gordon moved to dismiss the indictment arguing that the prosecution was time-barred. Gordon argued that the government had constructive knowledge of his illegal presence in the United States as of the moment he crossed the border at San Ysidro and, through the exercise of due diligence, the government should have discovered his crime. Although charged with being "present and found" in the United States, Gordon asserted that this offense was not a continuing one in light of his entry through an official port of entry and the use of his real name, date of birth, and alien identification number, and thus his reentry was not surreptitious. Therefore, Gordon argued, his offense was complete for statute of limitations purposes at the time of his

successful reentry. Gordon also claims that he did not know his reentry was illegal because the I-294 form that he received upon his removal was confusing and he thought he was allowed to return after five years.

The government responded that Gordon's reentry was surreptitious because the presentation of an invalid green card concealed the illegality of his presence from the border authorities exercising normal diligence. And, because his reentry was surreptitious, the government argued, the statute of limitations did not begin to run until the government "actually discovered" Gordon's illegal presence in the United States. The government pointed out that requiring the border authorities to do a background check on everyone seeking to cross the border, even when they present an authentic immigration document, places an unreasonable burden on border personnel. Gordon responded that the border authorities have computers at their stations for precisely that reason, and insisted that background checks on everyone crossing the border is not too burdensome.

On August 3, 2006, the district court denied Gordon's motion, finding that the government could not be expected to run a background check on every person requesting permission to enter the United States, especially when he or she presents authentic immigration documents. The court held that the government did not have actual or constructive knowledge of Gordon's illegal reentry at the time he crossed the border, and therefore the indictment was not time-barred. On November 14, 2006, Gordon entered a conditional guilty plea, preserving his

right to appeal the district court's denial of his motion to dismiss the indictment.

At the sentencing hearing, the district court concluded that Gordon's offense level was twenty-one and his criminal history score was nine, which placed him in criminal history category four. This provided for an advisory guidelines range of fifty-seven to seventy-one months' imprisonment. The district court then heard arguments from both parties before sentencing Gordon.

Gordon argued for a sentence below the advisory guidelines range. He explained that when he was deported, he was told by immigration officials that he would be denied reentry for five years; after that, it was Gordon's understanding that he would be allowed to return by showing his green card to immigration officials. He claimed that his risk of recidivism and any threat he posed to the public in the future was significantly diminished because he would not return to the United States now that he knew he could not do so legally (without the permission of the Attorney General). In support of his arguments, Gordon presented a copy of the I-294 form that he says was the source of his sincere-albeit incorrect-belief that he could return to the United States after five years. He also emphasized the fact that he reentered the United States at an official port of entry and used his real identity, which was evidence of his sincere misunderstanding of the restrictions on his reentry. He said that he did not know his green card was invalid, despite his deportation in 1990.

The government argued for a sentence of 120 months' imprisonment, asserting that the guidelines range was "woefully inadequate" because Gordon preyed on vulnerable and defenseless elderly women, and that Gordon's prior deportation for similar crimes had done nothing to deter him from returning and claiming another elderly victim. Moreover, the government contended that Gordon's criminal history score under-represented the seriousness of his criminal history, and urged the district court for an upward departure to 120 months on the basis that such a sentence was necessary to protect the public from Gordon. This argument was based on the fact that seven of Gordon's prior convictions had been consolidated for sentencing, which resulted in him receiving two fewer points for his criminal history score. The government requested the guidelines range of seventy to eight-seven months' imprisonment, which would have been the guidelines range had Gordon's prior convictions not been consolidated. The government further argued that it could not prevent Gordon from returning to the United States and continuing his "signature offense" on society's elderly women.

Gordon responded that his prior crimes had adequately been accounted for and that his criminal history score did not under-represent the magnitude of his criminal history. Gordon also contended that the government's requested 120 months sentence was arbitrary, as it was not linked to any specific guideline. In a final comment to the court, Gordon apologized for returning to the United States, and again stated that he would not return in the future.

The district court rejected Gordon's claim that he did not know that he could not return to the United States without permission and that his green card was no longer valid. The district judge believed that Gordon was being intentionally deceitful when he presented his green card to immigration officials at the border, as "logic and common sense" dictated that one's permanent resident status (which a green card represents) is revoked when one is deported. Acknowledging Gordon's extensive contacts with the United States and lack of contacts with his native Belize, the district judge also discredited Gordon's promise not to return to the United States again. Noting Gordon's criminal inclinations, the district judge said he was not persuaded that Gordon would not reenter the United States, despite now knowing it was a federal crime to do so.

At that point, Gordon requested a sentence of thirty months' imprisonment on the basis that the delay in his prosecution had deprived him of the opportunity for a concurrent sentence, and that the government's requested sentence of 120 months would result in a sentence four times the national average for illegal reentry sentences and approximately twice what his advisory guidelines range yielded. The district judge rejected Gordon's request. He reasoned that, after considering the Pre-sentencing Report, the sentencing memoranda submitted by both parties, and the arguments raised, he was very concerned that Gordon had targeted society's most vulnerable citizens numerous times (even after deportation for the same types of crimes), had completely disregarded the laws of the United States, and was likely to return to the United States again and continue committing his signature

offense. The district judge concluded that he "need[ed] to protect the public," and that the guidelines calculation under-represented the impact of Gordon's criminal history and the danger to the community that he posed. The district judge sentenced Gordon to ninety-six months' imprisonment.

Gordon's first argument on appeal is that the district court erred when it held that the five-year statute of limitations for Gordon's illegal reentry offense was not triggered until Gordon was taken into custody by the Illinois Department of Corrections in 2001. Gordon contends that immigration officials had constructive knowledge of Gordon's illegal presence in the United States in November of 1995 and thus, the five-year statute of limitations for the crime of illegal reentry began to run at the time of his actual return to the United States. Shortly after the filing of Gordon's opening brief, this Court explicitly rejected Gordon's proposed constructive knowledge standard for statute of limitations purposes on illegal reentry crimes in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007). As a result, Gordon argued in his reply brief that *Are* was wrongly decided and should be overturned.

We review de novo whether the limitations period has run, giving deference to necessary factual determinations by the district court. *United States v. Barnes*, 230 F.3d 311, 314 (7th Cir. 2000). We will not reject the district court's factual findings unless they are clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 365-66 (1991); *United States v. Greve*, 490 F.3d 566, 570 (7th Cir. 2007).

The statute of limitations for non-capital offenses provides that "no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found . . . within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). Federal prosecution for illegal reentry, a non-capital offense, is subject to a five-year limitations period. *See United States v. Clarke*, 312 F.3d 1343, 1346 (11th Cir. 2002); *see generally Are*, 498 F.3d 460 (applying a five-year statute of limitations to a § 1326(a) violation). Generally, an offense is "committed" when each element of the offense has occurred. *Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999). The offense of illegal reentry pursuant to 8 U.S.C. § 1326(a)(2) is committed in any of three ways: when the deported alien (1) enters the United States; (2) attempts to enter the United States; or (3) is at any time found in the United States. *United States v. Herrera-Ordones*, 190 F.3d 504, 509 (7th Cir. 1999).

An alien commits the offense of being "found in" the United States if he enters via a surreptitious border crossing or "enters through a recognized port by means of specious documentation that conceals the illegality of his presence." *United States v. Acevedo*, 229 F.3d 350, 355 (2d Cir. 2000) (internal quotations omitted), *cert. denied*, 531 U.S. 1027, 121 (2000); *see United States v. Lopez-Flores*, 275 F.3d 661, 663 (7th Cir. 2001) (explaining that, in the case of surreptitious reentry, the "found in" offense is first committed at the time of reentry). A deportee who reenters the United States by presenting an invalid green card but uses his real name still deceives immigration officials as to the legality of his

presence, and therefore enters surreptitiously. *Acevedo*, 229 F.3d at 355.

Gordon first contends that his entry was not surreptitious. We disagree. Gordon entered through a recognized port by means of an authentic but invalid green card that concealed the illegality of his return to the United States. Gordon also claims that he did not know that his green card was no longer valid despite having been deported. The district court found this assertion to be unbelievable. Absent clear error here, we accept the district court's conclusion that this assertion was not credible. *See Greve*, 490 F.3d at 570; *see also United States v. Jones*, 21 F.3d 165, 168 (7th Cir. 1994) ("It is well-established that the district court's factual findings and credibility determinations are reviewed for clear error."). Accepting the district court's finding that Gordon knew that his green card was invalid, Gordon's presentation of that green card, combined with his non-disclosure of his prior deportation to the immigration officials at his reentry, does more than merely suggest that his reentry into the United States was surreptitious. Gordon sought to deceive immigration officials (and did so successfully) as to his legal status in this country upon his reentry in November of 1995.

Gordon argues that *Are* was wrongly decided, because unlike the other Courts of Appeal, this Court has taken the burden off of the government entirely by explicitly rejecting a constructive knowledge standard. Contrary to our sister circuits, we held in *Are* that when the government "should have discovered" a deportee's illegal presence in the United States is irrelevant to when the statute of

limitations begins to run on the deportee's § 1326(a) offense. *Compare Are*, 498 F.3d at 466 (constructive knowledge is irrelevant to statute of limitations determination), *with United States v. Rivera-Ventura*, 72 F.3d 277, 281-82 (2d Cir. 1995) (the statute of limitations begins when "the authorities know, or with the exercise of diligence typical of law enforcement authorities, could have discovered the illegality of his presence"), *United States v. Lennon*, 372 F.3d 535, 541 (3d Cir. 2004) ("[I]llegal re-entry begins, for statute of limitations purposes, when the alien presents himself non-surreptitiously (i.e. using his own name) at an open point of entry even though immigration personnel failed to react."), *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996) (statute of limitations starts when alien is "found," but barring circumstances that suggest that immigration officials should have known of deportee's presence earlier), *United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994) (statute of limitations begins when immigration could have discovered the violation, using diligence typical of law enforcement authorities), and *Clarke*, 312 F.3d at 1347-48 (11th Cir.) (statute of limitations starts when federal government could have discovered through reasonable diligence that deportee was illegally present in the United States). Gordon asserts that under *Are*, the government is allowed to "ignore all signs of an alien's presence in the United States until it decide[s] it want[s] to prosecute him."

The flip-side of Gordon's argument, however, is that so long as an alien hides well for five years after giving the government a mere sniff of his presence, he cannot be prosecuted. While blatant flight from justice may toll the statute of limitations,

we need not provide an incentive to illegal aliens to subtly fly under the government's radar. We believe this to be a compelling reason not to join our sister circuits on this issue. *See Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1364 (7th Cir. 1996) (reiterating the importance of stare decisis). Although Gordon makes some valid arguments challenging the reasoning of *Are*, we do not find them compelling enough to overrule Circuit precedent. Thus, we decline to reconsider or overturn *Are*.

In *Are*, this Court held that, for statute of limitations purposes, "[t]o be 'found in' the United States without permission after deportation means to be 'present in' the United States without permission after deportation; the immigration agency's 'discovery' of the alien (whether actual or constructive) is not an element of the offense." 498 F.3d at 466 (emphasis in original). Being "found in" the United States at any time is a continuing offense. *Id.* at 464; *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460-61 (7th Cir. 2006) (*citing United States v. Cores*, 356 U.S. 405, 408 (1958)). Hence, "a deportee who has reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected." *Are*, 498 F.3d at 466 (*citing Rodriguez-Rodriguez*, 453 F.3d at 460). "The limitations clock does not run during this period because the deportee's crime continues; he remains illegally 'present in' the United States." *Id.* "[B]ecause the 'found in' version of § 1326(a)(2) is a continuing offense, the date on which the immigration agency 'should have discovered' the alien is simply irrelevant." *Id.* Under *Are*, the limitations period in an illegal reentry case

begins to run, at the earliest, when the immigration authorities actually discover the illegal alien's presence, identity and status. *Id.* at 466-67. At the latest, it begins to run when the alien turns himself in or is arrested. *Id.*

Both the date of the government's actual discovery of *Are*'s illegal presence in the United States, as well as his arrest for violating § 1326(a)(2) were within five years of the date of his indictment for that offense. *See Are*, 498 F.3d at 467. Therefore, the facts of the *Are* case did not require the Court to commit itself to a single operative date on which the statute of limitations clock began to run. In the case now before us, we again need not assign a single operative date. Because we find that Gordon's entry was surreptitious, the government necessarily did not have actual knowledge of his illegal status upon reentry in November of 1995. Gordon managed to fly under the government's radar until October 12, 2000, when he was arrested for yet another home invasion and armed robbery of an elderly woman. He was convicted on August 8, 2001, and entered the custody of the Illinois Department of Corrections on August 10, 2001. It was not until an April 21, 2006 interview of Gordon by an immigration agent that the government gained actual knowledge of Gordon's illegal presence. Because Gordon was already in custody, there was no date of arrest for his illegal reentry offense.

The government concedes that it would have gained knowledge of Gordon's illegal presence on August 10, 2001 had standard procedures been followed, and thereby accepts August 10, 2001 to be the operative date that triggered the statute of

limitations. However, under *Are*, constructive knowledge is irrelevant. 498 F.3d at 466. Despite a failure to follow standard procedures that would have resulted in actual knowledge, the federal government did not have actual knowledge of Gordon's illegal presence until April 21, 2006. *See, e.g., Clarke*, 312 F.3d at 1348 (state officials' knowledge of defendant's illegal presence cannot be imputed to federal immigration officials); *United States v. Mercedes*, 287 F.3d 47, 55 (2d Cir. 2002) (same). We point out, however, that even if we were to use the constructive knowledge date of August 10, 2001, Gordon's indictment would still be timely.

Under the standard set forth in *Are*, the only possible date from which the statute of limitations could begin to run is April 21, 2006, the date of the federal government's actual discovery of Gordon's illegal presence. Therefore, Gordon's May 9, 2006 indictment was timely, and the district court properly denied his motion to dismiss the indictment.

Gordon also argues on appeal that his sentence of ninety-six months' imprisonment was unreasonable. Gordon's 1990 removal was subsequent to an aggregated felony conviction, therefore Gordon was subject to the harsher criminal penalties of fines, imprisonment of not more than twenty years, or both. 8 U.S.C. § 1326(b)(2). Gordon points out that the sentence was twenty-five months above the high end of his advisory guidelines range, and argues that the district court failed to provide a sufficient explanation for the upward departure.

We review a sentence under an abuse of discretion standard, regardless of whether the sentence is inside or outside of the Sentencing Guidelines range. *Gall v. United States*, 552 U.S. ----, 128 S.Ct. 586, 597 (2007). We begin by ensuring that the district court did not commit any significant procedural error, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Id.* If we find the district court's sentencing decision to be procedurally sound, we then consider the substantive reasonableness of the sentence under an abuse of discretion standard. *Id.*

In sentences outside of the Guidelines range, we must consider the extent of the deviation from the Guidelines range, but we must also give due deference to the district court's determination that the § 3553(a) factors, when taken as a whole, justified the extent of the variance. *Gall*, 128 S. Ct. at 597. Variances from the Guidelines should be explained and supported with compelling justifications for such deviations. *United States v. Wachowiak*, 496 F.3d 744, 749-50 (7th Cir. 2007). The fact that we "might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 128 S. Ct. at 597. We acknowledge that: "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full

knowledge of the facts and gains insights not conveyed by the record." *Id.* 128 S. Ct. at 597 (internal quotation omitted). Because the district court has greater familiarity with the case and individual defendant, and because it has an "institutional advantage over appellate courts in making these sorts of determinations" (in light of their frequency), we defer, absent an abuse of discretion, to its ruling. *Id.* (quoting *Koon v. United States,* 518 U.S. 81, 98 (1996)).

Gordon first argues that his sentence is unreasonable because it rests upon a clearly erroneous factual finding that Gordon knew it was illegal to return to the United States. Gordon contends that the district court did not credit any of Gordon's testimony or evidence, thereby ignoring a crucial mitigating factor. As noted above, absent clear error, we defer to the district court's determination regarding Gordon's lack of credibility on this point. Furthermore, the district court did in fact consider the evidence, namely, the I-294 form that Gordon presented as the alleged source of his confusion regarding the legality of his return, in its opinion regarding Gordon's motion to dismiss. Again, we find no problem with the factual conclusion that, when read in its entirety, the I-294 form made it clear to Gordon that he was not allowed to return to the United States without permission. At sentencing, the judge again stated his disbelief that, after going through deportation proceedings in which his permanent resident status was revoked, Gordon could have possibly believed his green card a memorialization of permanent resident status-was somehow still valid.

Gordon also asserts that his sentence is unreasonable because the district judge failed to articulate anything unique or compelling about Gordon or his criminal history that would justify a sentence so high above the advisory guidelines range. We disagree. At the sentencing hearing, the district judge distinguished Gordon from the hundreds of thousands of other illegal aliens that enter the United States each day who come here to work and support their families. *See Koon*, 518 U.S. at 113 ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). Instead, as the district judge noted, Gordon came here to commit crimes and take advantage of the most vulnerable people who cannot defend themselves. The district judge explained that it did not believe Gordon would not return to the United States, despite his promise not to, because his entire family is here, he has nothing in Belize, he has stated that he was miserable in Belize, and based on his prior actions, the illegality of his return to the United States is of no concern to him. The district judge was also convinced that Gordon would again prey on the vulnerable members of society and would use implied or actual violence. These considerations appropriately related to the nature, circumstances, and seriousness of the offenses and to the need for just punishment, adequate deterrence, and the protection of the public. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(A)(C); *see also United States v. King*, 506 F.3d 532, 536-37 (7th Cir. 2007) (holding that a sentence thirty-four months above the top of defendant's

advisory guidelines range was reasonable); *United States v. Walker*, 447 F.3d 999, 1008 (7th Cir. 2006) (holding that a sentence thirty months above the top of defendant's advisory guidelines range was reasonable). The district court's explanation was sufficient reasoning for the variance from the guidelines range; it was not required to explain each day, week, or month above the guidelines range it imposed. *See Wachowiak*, 496 F.3d at 750 (holding that, if "the sentence chosen is within the broad range of objectively reasonable sentences in the circumstances, the sentence will be affirmed."); *United States v. Vitrano*, 495 F.3d 387, 390-91 (7th Cir. 2007) (explaining that, post-Booker, the fact that a district court departs from the advisory guidelines is not the issue; the issue is whether the sentence imposed is reasonable). We therefore find that the district court did not abuse its discretion in sentencing Gordon above his advisory guidelines range, and his sentence was reasonable.

For the foregoing reasons, we AFFIRM the district court's denial of Gordon's motion to dismiss and Gordon's sentence.

RIPPLE, Circuit Judge, concurring.

I join the judgment of the court and that part of its opinion that holds that the imposed sentence is a reasonable one.

With respect to the statute of limitations issue, I agree that, if *United States v. Are*, 498 F.3d 460 (7th Cir. 2007), is the governing precedent, the timeliness issue in this case can be decided on its authority. As my colleagues note, however, *Are* set this circuit on a path different from all the other circuits that have addressed this issue. As far as I have been able to ascertain, it did so without affording the entire membership of the court an opportunity to participate in the decision-making process. *See* Circuit Rule 40(e). Consequently, I have a serious doubt as to whether *Are* is a viable precedent upon which to predicate today's decision.[1]

Despite these misgivings about the legitimacy of the precedent upon which it relies, I join in the judgment of the court because I do not believe that the Government can be charged with constructive

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[1] The decision in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007), relies in significant part on our previous decision in *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 461 (7th Cir. 2006) for the proposition that we ought not recognize constructive notice. Rodriguez-Rodriguez was not directly on point, but, to the extent that it can be said to have lighted the way for the panel in *Are*, I note that *Rodriguez-Rodriguez* also apparently was never circulated to the entire court under Circuit Rule 40(e), even though, according to the *Are* panel, it was establishing a conflict among the circuits and disapproving dicta in *United States v. Herrera-Ordones*, 190 F.3d 504 (7th Cir. 1999), that had assumed that the view of the other circuits was correct.

notice when Mr. Gordon presented himself at the border with an invalid, although authentic, green card. Indeed, it seems to me that his actions at that point can be characterized as affirmatively misleading the Government. The Government should not be charged with constructive knowledge of this surreptitious entry, even though it occurred at an official border checkpoint.

A True Copy:

/s/
Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

United States of America,	)	
	)	
v.	)	**No. 06 CR 334**
	)	**Judge Ronald A.**
Carl Gordon	)	**Guzman**
	)	
	)	

MEMORANDUM OPINION AND ORDER

Defendant, Carl Gordon, moves the court to dismiss the indictment in the above-captioned case on the ground that the government's prosecution is barred by the statute of limitations. Alternatively the defendant moves this court to dismiss the indictment for lack of venue. For the reasons given below, the motion is denied.

The indictment charges that on or about August 10, 2001 the defendant, an alien who had previously been deported and removed from the United States on or about January 3, 1990, was present and found in the United States without having previously obtained express consent of the Attorney General for reapplication for admission into the United States in violation of Title 8 United

States Code §§ 1326(a) and 1326(b)(2). Section 1326(a) provides:

> Subject to subsection (b) of this section, any alien who–
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter,
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his re-embarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that we was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(8 U.S.C. § 1326(a).)

Defendant's motion to dismiss is predicated upon the argument that the statute of limitations begins to run the moment immigration authorities discover the offending alien's illegal presence in the United States. Defendant argues that aliens who

enter the United States through an official port of entry are deemed to have completed their crimes at the time of successful entry because, at that moment, immigration authorities are alerted to the illegal reentry itself and can, through the exercise of diligence typical of law enforcement authorities, discover the violation. Aliens who enter the country at an unauthorized location, however, complete their offense the moment they are eventually "found in" the United States by immigration authorities. Since the defendant in this case reentered the United States less than one week before November 8, 1995 through the official port of entry at San Ysidro, California and did so by presenting his (expired) green card to the U.S. immigration officials at the official port of entry, it was at this time that the crime was complete.[1] Therefore, the defendant argues, the statute of limitations in this case expired years before the return of the indictment in this case on May 9, 2006.

The government, on the other hand, maintains that the statute of limitations did not begin to run when the defendant entered the United States because his unlawful entry with an invalid "green card" constitutes a surreptitious reentry. At that time, according to the Government, inspectors generally allowed individuals who presented facially valid green cards to enter the country without

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[1] The green card included his name, date of birth, photographs, and fingerprint. He was inspected and granted admission by the immigration authorities upon presentment of his card. Thus, defendant maintains, the immigration authorities had ample knowledge of his reentry to the United States and could have discovered the violation at this time. The offense therefore does not continue beyond that date.

further checking on their immigration status. The defendant's possession of a revoked green card was unlawful, because he was required to surrender it upon his deportation. 8 C.F.R. §§ 246.9, 247.14. By presenting his revoked green card the defendant implicitly represented that he still had the status of a lawful permanent resident, something he knew to be false. This, the government argues, is a surreptitious entry which does not trigger the commencement of the statute of limitations.

The defendant relies upon *United States v. DiSanrillo,* 615 F.2d 128 (3d Cir. 1980). In that case:

> DiSantillo was "arrested and deported" in 1962 when he was sixteen years of age and that he subsequently entered the United States as an immigrant on March 23, 1970, with a visa issued by the American Consul General in Naples, Italy. He was interviewed by agents of the Immigration and Naturalization Service in Pittsburgh, Pennsylvania in 1976, and on January 16, 1979, nearly nine years after his entry into the United States, he was indicted under § 1326 on the theory that he made misrepresentations in his visa application.

Id. at 130. In its analysis, the court determined that Congress must have intended to distinguish between the crimes committed by entry or attempted entry through the regular immigration service procedures, of which the INS would have an official record, and the crime committed by being found in the United States after an alien has made a surreptitious entry,

of which the INS would have no official record. If no distinction were intended, there would be no need to provide separate language in the statute describing both one who "enters" and one who is "found in" the United States:

> Congress must have included the word "found" in § 1326 to alleviate the difficult law enforcement burden of finding and prosecuting this class of illegal aliens, who are already aware that they are in violation of the law as evidenced by their surreptitious entry, before the five year statute of limitations runs.

Id. at 135. The court goes on to find that because DiSantillo entered through a recognized immigration port of entry, the immigration authorities were aware of this entry and could have through the exercise of typical diligence discovered his violation at that time. The American Consulate in Naples, Italy processed and approved his application for a visa and the immigration authorities allowed him to enter New York later in 1970. He filed a report each year with the INS giving his current address. Thus, the government had sufficient opportunities to discover DiSantillo's offense.

It appears that the *DiSantillo* court based its determination on two factors: First, that the defendant entered only after having followed the required procedure by applying for a visa at the US Consulate in Italy and then being inspected by INS at his entry point, thus giving the government an opportunity to discover his offense. Second, the fact that there was, in the court's mind, serious doubt

that DiSantillo intentionally misrepresented any facts or in any way misled the INS at his inspection when he admitted having been previously deported, but not having been arrested. The court was in doubt that DiSantillo knew the difference, or even, that he had in fact been both arrested and deported when he was 16 years old. This case was one where both an opportunity for the government to discover the offense was clearly present and the defendant made no material misrepresentations during his inspection and entry so as to make his entry a surreptitious one.

The defendant also relies upon *United States v. Herrera-Ordones*, 190 F.3d 504 (7th Cir. 1999). In that case the issue was one of venue. In order to determine the proper venue, the court was required to determine where the offense took place, and thus, when the defendant was "found" under 18 U.S.C. § 1326. Darius Herrera-Ordonez was arrested in the United States at Elkhart, Indiana after having been previously deported. When arrested, however, he gave the alias of Jose Rendon and a false birth date and Social Security number. To the INS he gave still another false name, Jose Aldelberto Rendon-Contreras, false Social Security number and false place of entry into the United States. A fingerprint analysis subsequently identified the defendant as Juan Carlos Guzman Gorrea. Eventually, the INS obtained conviction records for Juan Carlos Gorrea, an individual who was deported on April 9, 1997 after a conviction for delivery of heroin in 1992, and also a file on Darius Herrera-Ordonez, which showed a deportation as an aggravated felon in June 1994. To further confuse the issue, in another interview with INS Mr. Herrera-Ordonez, while maintaining

the alias of Jose Rendon Contreras, admitted that he had previously been deported and reentered the United States illegally near Brownsville, Texas in approximately April 1996. Finally, on April 19, 1997, the INS received a fingerprint examiner's report that Jose Aldelberto Rendon, Jose Rendon-Contreras and Darius Herrera-Ordonez were one and the same. On August 13, 1987, the defendant was charged with being an alien who reentered without permission and was found in the United States after deportation for an aggravated felony conviction. At trial the defendant asserted that he was "found in" the Northern District of Indiana because his presence there was known to law enforcement and to the INS. The court found that the evidence established that the INS did not confirm the defendant's true identity or status until after he had been transported to the Southern District of Indiana. Therefore, venue was proper in the Southern District.

The court determined that being "found" means being "discovered" in the United States and has two components: first, the INS discovers the physical presence of the deported alien, and second, it ascertains the alien's identity as an illegal alien and status as one who has reentered alter previous deportation.

> We are in complete agreement with this assessment of the offense and conclude that an alien is "found" within the meaning of § 1326 when the INS both discovers his presence in the United States and knows that, because of his identity and status, his presence here is illegal.

Id. at 510. In considering the defendant's argument that the INS had constructive knowledge of his illegal status the court agreed that the "found in" element of § 1326(a) requires the Government to exercise reasonable diligence in screening for previously deported aliens. Applying that standard to the facts before it, the *Herrera-Ordonez* court determined that "the INS agents investigated Mr. Herrera-Ordonez' identity and status with appropriate methodical diligence after learning of his presence in the Elkhart county jail." *Id.* at 511. The court found that it was not until the defendant gave the INS the truthful information that he had been deported earlier that the INS could have been expected to know the defendant's identity and status.

Turning to the case before us, the government argues that the defendant's entry was surreptitious because he lied to the INS when he asserted a legal right to enter the United States by proffering his expired green card at the border crossing. The card had been revoked and was illegally possessed by him. In support, the government cites *United States v. Almonte*, No. 98 Cr. 666 (JFK), 1998 WL 782023. [2]

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[2] In *Almonte*, the defendant reentered the United States by presenting his old green card at an airport immigration checkpoint in Newark, New Jersey. *Id.* at *2. Seven years later the government indicted the defendant and charged him with illegal reentry in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2). In that case the court found that the entry was not such as to place the INS on notice that his presence in the United States was illegal. *Id.* at *3. The court reasoned that an alien who presents an apparently valid passport and green card would not present reasonable cause for suspicion. *Id.*

To conclude that presentation of revoked documentation that correctly identifies the defendant but incorrectly asserts his right to enter the United States establishes constructive notice for purposes of commencing the running of the statute of limitations, the government argues, "would require a level of diligence that would necessitate background checks on everyone seeking to cross the border in order to authenticate each piece of immigration documentation thereby placing an unreasonable burden on the border authorities, slowing legitimate border crossings to a crawl and interfering with the authorities' ability to focus resources where there (sic) are needed to protect the borders." (Gov't's Resp. Defs Mot. Dismiss Indictment, at 6.) The defendant, on the other hand, argues that the mere fact that the green card the defendant presented had been revoked and ought to have been surrendered at an earlier date does not defeat the obligation of immigration authorities to exercise that diligence typical of law enforcement authorities in investigating whether the presence of an alien is illegal. The United States Customs Service maintains a computer database available to INS border inspectors at the time of the defendant's illegal reentry and is designed to verify the immigration status of aliens. *Almonie*, 1998 WL 782023 at *3. Defendant also points out that the Eleventh Circuit has concluded that the INS maintains a "service or lookout book" to give notice to INS agents throughout the nation of a person's deportation in order to prevent them from re-entering the United States. *United States v Gay*, 7 F.3d 200, 201 (11th Cir. 1993).

The controlling determination which remains for the Court to make is whether reliance upon the defendant's misrepresentation of his right to reenter the United States by presentation of a revoked permanent resident card which he illegally possessed, constitutes the exercise of reasonable diligence in screening for previously deported aliens; or whether the government was obligated to do more, and having failed to do so, will be charged with having constructive knowledge of the defendant's illegal presence since the date of his reentry. Neither the Government nor the defendant have provided the Court with a clear picture of what an ordinary border crossing event at San Ysidro entails. How many such crossings take place each day? Now much time is allotted or available for each such inspection? What resources do the INS agents at that border crossing point actually have available to them as a practical matter in determining the legality of each such crossing? What is the usual and customary procedure? Does that procedure differ depending on what documentation is produced by the party seeking entry? None of these questions have been sufficiently addressed. The Court, however, takes judicial notice of The Bureau of Transportation Statistics (BTS)[3] web site found at http://www.bts.gov/publications/north_American_trade_and_travel_trends/boxes/box_3_tabl.html, which states that in 1996 the San Ysidro border crossing station processed 13,782,593 personal vehicles

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[3] The Bureau of Transportation Statistics (BTS) was established as a statistical agency in 1992. Its basic authorizing legislation is the Safe, Accountable, Flexible, Efficient Transportation Equity Act: (SAFETEA-LU) (Pub. L. 109-59, Aug. 10, 2005, 119 Stat. 1144)

crossing the border from Mexico in to the United States. Those vehicles contained 34,569,739 passengers. In addition, 92,355 buses containing 878,713 passengers were also inspected. Finally, an additional 8,809,794 pedestrians were inspected crossing the border at San Ysidro in 1996. These numbers are not surprising. It is well known that the daily traffic at the US-Mexican border is overwhelming. No doubt, it is these huge numbers that account for the inability of the border crossing agents to check the validity of every seemingly valid entry document presented during the course of an ordinary day. Whether the numbers were precisely the same in 1995 is not certain, but they would not have been all that different. The defendant in this case, as in *Almonte*–and in contrast with *DiSantillo*–lied to the government about his status and fortified that lie by presenting what he knew to be invalid documentation. The invalidity of that documentation was made all the harder to ascertain upon inspection by virtue of the fact that the documentation was, indeed, an official–government issued–resident alien card. The border crossing agents had no reason to doubt the validity of that documentation, nor did they, under the circumstances, have the ability to check every seemingly legitimate document presented to them by every single one of the tens of thousands of border crossers they inspect on a daily basis. The Court is satisfied that this was a surreptitious entry and that the government had neither actual nor constructive knowledge of the defendant's illegal entry into the United States in 1995 when he crossed the border.

The defendant acknowledges that the 7th Circuit's recent decision in *United States v.*

Rodriguez-Rodriguez, 453 F.3d 458 (7th Cir. 2006) establishes that venue does lie in the Northern District of Illinois even if the defendant's crime was complete in the Southern District of California, his point of entry. Therefore, the defendant's challenge to this court's venue is deemed abandoned.

For the reasons given above, the motion to dismiss the indictment is denied.

Dated: August 3, 2006

SO ORDERED **ENTER:**

/s/ Ronald A. Guzman
RONALD A. GUZMAN
District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1714

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL GORDON,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 06 CR 334–Ronald A. Guzman, *Judge*.

ORDER

On January 30, 2008, defendant-appellant filed a petition for rehearing *en banc* in connection with the above-referenced case. On February 21, 2008, an Answer of the plaintiff-appellee to the petition for rehearing *en banc* was filed. No judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing or rehearing *en banc* is DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
	)	**No. 06 CR 334**
v.	)	**Judge Ronald A. Guzman**
	)	
CARL RAYMOND GORDON	)	
	)	

INS #: A 034 347 228

GABRIEL PLOTKIN,
Defendant's Attorney
Brian Netols, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed
On or After November 1, 1987)

THE DEFENDANT ENTERED A PLEA OF:

guilty to Count One of the indictment, which was accepted by the court,

The remaining Counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense
8 U.S.C. § 1326(a) and (b)	Reentry After Deportation

Date Offense Concluded	Count Number(s)
	One

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **NINETY-SIX (96) MONTHS.**

Defendant shall receive credit for time served in Bureau of Immigration and Customs Enforcement custody.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall he on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all counts of conviction, namely, Count One to a period of THREE (3) years of Supervised Release.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory,

standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen clays of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance up to a maximum of 104 tests per year as directed by the Probation Office;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such at1 offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense defendant shall not possess a firearm or ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax

returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependants and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a

felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

Following the custodial sentence, the defendant shall be turned over to a duly authorized authority for

deportation proceedings. If deported, the defendant shall not return to the United States during his/her term of supervised release without the written consent of the Attorney General.

Defendant is advised that if he returns to the United States all conditions of supervised release shall apply and he must comply with all conditions of supervised release immediately.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options my be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine
$100.00	Fine Waived
Restitution	Mandatory Costs of Prosecution
$	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitutions, fines, and costs imposed by this judgment are filly paid.

SCHEDULE OF PAYMENTS

* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including costs of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

* All criminal monetary penalty payments, except those payments through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

* Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

* Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:

Due Immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

* * *

The defendant is immediately remanded to the custody of the United States Marshall.

Date of Imposition of Judgment/Sentencing: March 13, 2007

/s/ Ronald A. Guzman
RONALD A. GUZMAN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 15th day of March, 2007

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(2)

No. 07-1609

FILED
2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CARL GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1326(a) of Title 8, United States Code, makes it a federal offense for any previously removed alien "at any time [to be] found in" the United States, without the permission of the Attorney General. The question presented is whether the statute of limitations for that offense begins to run when an alien reenters the United States by presenting an authentic but invalid green card to border agents.

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In the Supreme Court of the United States

No. 07-1609

CARL GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 513 F.3d 659. The opinion of the district court (Pet. App. 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2008. A petition for rehearing was denied on March 24, 2008 (Pet. App. 33a). The petition for a writ of certiorari was filed on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of being found in the United States after removal, in violation of 8 U.S.C.

1326(a). He was sentenced to 96 months of imprisonment, to be followed by three years of supervised release. Pet. 35a. The court of appeals affirmed. *Id.* at 1a-20a.

1. Petitioner, a citizen of Belize, lawfully entered the United States in 1974. He later became a lawful permanent resident, and was issued a resident alien card, or "green" card. Pet. App. 1a.

In 1985, petitioner was convicted in Illinois state court of multiple charges stemming from his commission of a series of home invasion robberies targeting elderly women. In 1990, following a hearing before an immigration judge (IJ), petitioner was removed from the United States. Before petitioner was removed, the IJ informed him that he was no longer a lawful permanent resident. Petitioner also received a form explaining that he would need the Attorney General's permission to return to the United States. Pet. App. 1a-2a.

Petitioner later returned to the United States without obtaining the permission of the Attorney General. The exact date of his return is uncertain, although petitioner asserted on appeal that he returned sometime in November 1995. Pet. App. 2a; see also Pet. 3. On August 8, 2001, petitioner was convicted in Illinois state court for the home invasion and armed robbery of a 90-year-old woman. Pet. App. 2a; Gov't C.A. Br. 5. On August 10, 2001, he began serving his sentence in state custody. Pet. App. 2a.

On April 21, 2006, while he was still in state custody, petitioner was interviewed by an agent of the Bureau of Immigration and Customs Enforcement. Pet. App. 3a. During that interview, petitioner admitted that he had illegally reentered the United States. He told the agent that he had entered the United States via Mexico, at the

San Ysidro, California, port of entry, by showing the border guard his authentic but now-invalid green card, which he had kept even though federal regulations required him to surrender it upon removal. *Ibid.*; Gov't C.A. Br. 4-5; see Pet. App. 24a (citing 8 C.F.R. 246.9, 247.14).

2. On May 9, 2006, a grand jury returned a one-count indictment charging petitioner with being a previously removed alien unlawfully present and found in the United States, in violation of 8 U.S.C. 1326(a) and (b)(2). Petitioner moved to dismiss the indictment, arguing, *inter alia*, that the statute of limitations had expired. Under 18 U.S.C. 3282(a), the statute of limitations for petitioner's offense is five years. Petitioner argued that his offense was complete when he presented his invalid green card to the border guard in November 1995. At that point, he argued, the government had "constructive knowledge of his illegal presence" and therefore had only five years to charge him for that offense. Pet. App. 3a-4a.

The district court denied petitioner's motion to dismiss. Pet. App. 21-32a. The court concluded that the statute of limitations did not begin to run at the time of petitioner's reentry. *Id.* at 31a. The court reasoned that petitioner "lied to the government about his status and fortified that lie by presenting what he knew to be invalid documentation," and it found that federal agents at the border crossing would have had "no reason to doubt the validity of that documentation, nor * * * the ability to check every seemingly legitimate document presented to them by every single one of the tens of thousands of border crossers they inspect on a daily basis." *Ibid.* The court concluded that the government therefore "had neither actual nor constructive knowledge of the defen-

dant's illegal entry into the United States in 1995 when he crossed the border." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-20a. First, noting that Section 1326 can be violated by unlawful entry, attempted entry, or being "at any time found in" the United States, the court explained that an alien violates the "found in" provision "if he enters via a surreptitious border crossing or 'enters through a recognized port by means of specious documentation that conceals the illegality of his presence.'" *Id.* at 9a (quoting *United States* v. *Acevedo*, 229 F.3d 350, 355 (2d Cir.), cert. denied, 531 U.S. 1027 (2000)). The court concluded that petitioner's reentry was surreptitious because he "entered through a recognized port by means of an authentic but invalid green card that concealed the illegality of his return to the United States." *Id.* at 10a.

Relying on its then-recent decision in *United States* v. *Are*, 498 F.3d 460 (7th Cir. 2007), the court of appeals concluded that the statute of limitations for the offense of being "found in" the United States after removal does not begin to run at least until the federal government has actual knowledge of an "illegal alien's presence, identity and status," even if the government could have discovered the alien sooner through "reasonable diligence." Pet. App. 10a-13a. The court concluded that the federal government did not gain actual knowledge of petitioner's illegal presence in the United States until his immigration interview on April 21, 2006, and that his indictment on May 9, 2006, was therefore timely. *Id.* at 13a-14a. The court also noted that the government had conceded that, had standard procedures been followed, it would have gained knowledge of petitioner's illegal presence on August 10, 2001, when he entered state custody. The court observed that, "even if [it] were to use

the constructive knowledge date of August 10, 2001, [petitioner's] indictment would still be timely." *Id.* at 14a.

Judge Ripple filed a concurring opinion. Pet. App. 19a-20a. He agreed that *Are* was controlling if it constituted "the governing precedent," but expressed "misgivings about the legitimacy of the precedent" in light of the apparent failure to follow circuit rules requiring precirculation to the full court of decisions that establish a circuit conflict. *Id.* at 19a (citing 7th Cir. R. 40(e)). Nonetheless, he concluded that even if constructive knowledge could start the running of the limitations period, the government could not be charged with constructive knowledge from the time of petitioner's border crossing. Judge Ripple reasoned that, because petitioner "presented himself at the border with an invalid, although authentic, green card," thereby "affirmatively misleading the Government," the "Government should not be charged with constructive knowledge of this surreptitious entry, even though it occurred at an official border checkpoint." *Id.* at 20a.

ARGUMENT

Petitioner contends (Pet. 9-17) that this Court should grant review to resolve a "fundamental disagreement" over whether the statute of limitations for the offense of being "found in" the United States after removal begins to run as of the time the government can be said to have constructive, if not actual, knowledge of a deportee's illegal presence in the United States. Although the courts of appeals have articulated different approaches to the question, those analytical differences have been of limited practical significance. In any event, this case is not a suitable vehicle for review of the issue because, as the courts below made clear, the result in this case

would be the same under the constructive-knowledge standard for which petitioner argues. Further review is not warranted.

1. In rejecting petitioner's challenge to the timeliness of his indictment, the court of appeals relied on its then-recent decision in *United States* v. *Are*, 498 F.3d 460 (7th Cir. 2007), which held that the statute of limitations for the offense of being "found in" the United States after removal does not begin to run until, at the earliest, the date when the federal government "acquire[s] actual knowledge of the alien's physical presence, identity, and status as a prior deportee," or, at the latest, when "the alien surrenders or is arrested." *Id.* at 467; see Pet. App. 10a-14a. In so holding, *Are* rejected the proposition, articulated by other courts of appeals, that "constructive knowledge—the date on which immigration authorities should have discovered [a] § 1326(a)(2) violation—triggers the statute of limitations." 498 F.3d at 466; see also *id.* at 466 n.2 (citing cases from other circuits). The court reasoned that, "because the 'found in' version of § 1326(a)(2) is a continuing offense" that goes on for as long as the alien remains illegally present in the United States, the government's constructive knowledge of the alien's illegal presence "is simply irrelevant." *Ibid.*; see Pet. App. 10a-12a.

Petitioner contends (Pet. 9-12) that the Seventh Circuit's decision in *Are* created a circuit split that requires this Court's intervention. Petitioner overstates the extent of the disagreement, and no developed conflict exists that would warrant this Court's review. As a preliminary matter, although petitioner characterizes *Are* as "essentially hold[ing] that nothing short of the government's decision to arrest or prosecute the offender will trigger the statute of limitations," Pet. 12, the *Are* court

did not so hold. Rather, as petitioner elsewhere acknowledges (Pet. 7), *Are* did not definitively resolve whether the statute of limitations begins to run as of the date of arrest or as of the date of "*actual* discovery" of the alien's illegal presence. See 498 F.3d at 466-467. Nor did the court of appeals in this case have occasion to resolve that question, since petitioner in this case was already in custody when the federal government discovered his illegal presence. See Pet. App. 13a.

Petitioner is correct, however, that *Are*'s rejection of a constructive-knowledge standard stands in contrast to the language of a number of other appellate decisions, issued before *Are* was decided, that have stated that the limitations period for a "found in" Section 1326 prosecution may start to run not only on the date of a defendant's actual discovery but also at any earlier time when "the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities." *United States* v. *Santana-Castellano*, 74 F.3d 593, 598 (5th Cir.), cert. denied, 517 U.S. 1228 (1996); see also *Are*, 498 F.3d at 466 n.2 (citing cases). The differences between the Seventh Circuit's approach and those of other courts of appeals are, however, of limited practical significance. Pet. 10. The courts of appeals that have recited the constructive-knowledge standard have not generally relied on constructive knowledge of an alien's illegal presence in calculating the applicable limitations period; rather, they have generally found that law enforcement authorities could not reasonably have discovered the alien's illegal presence in the United States before the date of *actual* discovery, and that the statute of limitations therefore did not start to run before that date. See, *e.g.*, *United States* v.

Clarke, 312 F.3d 1343, 1348 (11th Cir. 2002) (per curiam); *United States* v. *Mercedes*, 287 F.3d 47, 56 n.11 (2d Cir.), cert. denied, 537 U.S. 900 (2002); see also *United States* v. *Rivera-Ventura*, 72 F.3d 277, 282 (2d Cir. 1995) (limitations period began to run when INS agents apprehended defendant); cf. *United States* v. *Bencomo-Castillo*, 176 F.3d 1300, 1303-1305 (10th Cir. 1999) (for purposes of determining applicability of Sentencing Guidelines enhancement, defendant not "found" until date when INS identified him as a previously deported alien); *Santana-Castellano*, 74 F.3d at 598 (same).

In *United States* v. *Gomez*, 38 F.3d 1031 (1994), the Eighth Circuit assumed, without deciding, that the government had been negligent in failing to discover that a defendant who had filed an application for temporary residence had previously been removed from the United States, but held that the "*earliest possible* time" at which government officials exercising reasonable diligence could have discovered the defendant's illegal presence was within the limitations period. *Id.* at 1037-1038. Although the court stated that "the statute of limitations for a 'found in' violation should * * * begin running when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation," the court also noted that, "[a]s the cases attest, the result of this diligence is that the time at which the immigration authorities should discover the violation is often at or near the time the defendant is taken into custody." *Id.* at 1037.

Finally, in *United States* v. *DiSantillo*, 615 F.2d 128 (1980), the Third Circuit reviewed the Section 1326 conviction of a defendant who had entered the United States via a recognized port of entry, using an

American-issued visa. In his visa application, he incorrectly stated that he had not been previously "arrested and deported," as opposed to merely having been excluded from the United States. *Id.* at 131. More than five years after his reentry, he was interviewed by INS agents, and was ultimately indicted for violation of Section 1326. *Id.* at 130. The Third Circuit held that the indictment should have been dismissed as untimely. *Id.* at 132, 137. The court noted that the authorities had processed and approved the defendant's visa application before his entry; that the defendant had "entered the United States through a recognized immigration port of entry"; and that "immigration authorities knew of his entry and could have, through the exercise of diligence typical of law enforcement authorities, discovered his violation at that time." *Id.* at 135-136. The court concluded that, because "the crime of illegal entry through a recognized INS port of entry after being arrested and deported is not a continuing offense," an alien "may not be indicted under § 1326 more than five years after he entered or attempted to enter the United States through an official INS port of entry when the immigration authorities have a record of when he entered or attempted to enter." *Id.* at 136-137. On the other hand, the court stated, "[i]f no record is possible because the entry was surreptitious and not through an official port of entry, the alien is 'found' when his presence is first noted by the immigration authorities." *Ibid.*

The import and continued vitality of *DiSantillo* is not entirely clear. Some courts have read *DiSantillo* to concern only the limitations period for the unlawful "entry" provision of Section 1326, and not the "found in" provision. See *Gomez*, 38 F.3d at 1035; see also *United States* v. *Ortiz-Villegas*, 49 F.3d 1435, 1437 (9th Cir.), cert. de-

nied, 516 U.S. 845 (1995). To the extent that *DiSantillo* does speak to Section 1326's "found in" provision, the Third Circuit has called its holding into question, suggesting that re-examination may be called for in an appropriate case. *United States* v. *Lennon*, 372 F.3d 535, 541 n.8 (3d Cir. 2004) (noting that there is "force" to the argument that "the passage of time does not give rise to a de facto amnesty that legalizes an unlawful alien's presence"). In any event, after *DiSantillo*, the Third Circuit has reiterated the suggestion that, in the case of surreptitious entry, the limitations period does not begin to run until the alien's presence comes to the attention of immigration officials, and has further made clear that an entry may be surreptitious even though it occurs at a recognized port. *Id.* at 540-541 (holding, for Sentencing Guidelines purposes, that a deportee who reentered the United States through a recognized port of entry, but using a false name, "committed" the crime of being "found in" the United States when she was apprehended by INS agents, and not immediately upon reentry); see also *United States* v. *Hernandez-Gonzalez*, 495 F.3d 55, 60 (3d Cir.) ("[T]he logic of *DiSantillo* does not apply where the alien entered surreptitiously, by, for example, concealing his or her identity"), cert. denied, 128 S. Ct. 685 (2007); cf. *Are*, 498 F.3d at 466 n.2 (citing *DiSantillo* for the proposition that "[t]he Third Circuit has * * * adopted an 'actual discovery' rule for cases in which there is no record of when the deportee reentered"). The decision below, which concerns a surreptitious entry at a recognized port, see Pet. App. 10a, is consistent with the Third Circuit's suggestion.

2. Even if review were otherwise warranted to resolve any differences between the Seventh Circuit's approach and the approaches of other courts of appeals,

however, this case would not be a suitable vehicle. As the courts below concluded, even if the limitations period began to run as of the date the government arguably had constructive knowledge of petitioner's illegal presence in the United States, the indictment would still be timely. See Pet. App. 14a ("We point out, however, that even if we were to use the constructive knowledge date of August 10, 2001, [petitioner's] indictment would still be timely."); see also *id.* at 19a-20a (Ripple, J., concurring) (concluding that the indictment would be timely even if the court were to apply a constructive-knowledge standard); *id.* at 31a (finding that the government did not have constructive or actual knowledge of petitioner's illegal presence more than five years before petitioner was indicted).

Petitioner's argument rests on the premise that the government had constructive knowledge that he was present in the United States well before August 10, 2001, the date when he entered state custody following his conviction for home invasion and armed robbery. Specifically, petitioner contends the government had constructive knowledge of his illegal presence as soon as "he provided accurate identifying information at the San Ysidro border" sometime in November 1995. Pet. 17. That argument, however, overlooks the fact that petitioner provided his identifying information to the border guard in the form of an authentic green card that he knew to be invalid, which "concealed the illegality of his return to the United States." Pet. App. 10a; see *id.* at 28a. Although petitioner asserts that immigration authorities could have discovered petitioner's illegal status had they consulted a "computer database specifically designed to verify the status of aliens entering the United States," Pet. 17, the district court in this case

specifically found that "[t]he border crossing agents had no reason to doubt the validity of [petitioner's] documentation, nor did they, under the circumstances, have the ability to check every seemingly legitimate document presented to them by every single one of the tens of thousands of border crossers they inspect on a daily basis," Pet. App. 31a. Other courts to address similar arguments have reached similar conclusions. See, *e.g.*, *United States* v. *Acevedo*, 229 F.3d 350, 355-356 (2d Cir.) (a deportee's presentation of a green card rendered invalid by his prior removal does not charge government with constructive knowledge), cert. denied, 531 U.S. 1027 (2000); cf. *United States* v. *DeLeon*, 444 F.3d 41, 52 (1st Cir. 2006) ("there can be no finding of lack of diligence" where a deportee who used an alias during the removal proceedings later reentered the United States using an invalid green card in his own name). For that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
DAVID E. HOLLAR
Attorney

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No. 07-1609

IN THE

Supreme Court of the United States

CARL GORDON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street,
Suite 3600
Chicago, IL 60601
(312) 263-3700

Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

The Government's brief in opposition offers no persuasive reason for denying certiorari. The decision below conflicts with the decisions of other circuits is wrong on its merits, and potentially impacts thousands of defendants.

The Government acknowledges that the circuit courts disagree on the question presented, but attempts to minimize the scope of the split and its importance by characterizing the conflict as merely a "contrast" in "language" with little "practical significance." Br. in Opp. 5. The Government also asserts that this case is not a suitable vehicle for resolving the conflicting approaches because the result in this case would be the same regardless of the applicable law. *Id.* at 10-12. Both arguments are wrong.

There is a clear and fundamental difference between the Seventh Circuit's subjective "actual discovery" standard for statute of limitations challenges to the illegal reentry statute and the objective "constructive knowledge" standard established by five other courts of appeals. The different standards have very profound consequences for defendants, law enforcement officers, and courts, and this case is an ideal vehicle for resolving which of the two standards is correct under 8 U.S.C. § 1326 and 18 U.S.C. § 3252.

I. THE DECISION BELOW CREATED A FUNDAMENTAL SPLIT AMONG THE CIRCUITS ON A QUESTION THAT DETERMINES WHETHER TENS OF THOUSANDS OF DEFENDANTS ARE PROTECTED BY THE FEDERAL CRIMINAL STATUTE OF LIMITATIONS.

The Government concedes, as it must, that the Court of Appeals for the Seventh Circuit has adopted a legal standard for when the statute of limitations begins to run in cases of illegal reentry that is expressly different than the legal standard adopted by the Courts of Appeals for the Second, Third, Fifth, Eighth, and Eleventh Circuits. *See* Br. in Opp. 6.

In the Seventh Circuit, the offense of being "found in" the United States is a continuing offense that lasts as long as an illegal alien remains in the country, even when the Government reasonably should know of the alien's illegal return. If the statute of limitations applies at all under this standard, it could not be triggered until the *subjective* moment when immigration authorities actually know of an alien's illegal presence, and may not begin until the point of arrest. Pet. App. 13a. Constructive knowledge of an alien's illegal presence in the United States is irrelevant to any calculation of the statute of limitations. Pet. App. 14a.

The five other courts of appeals to address the issue, by contrast, have held that the offense of being "found in" the United States is complete, and the statute of limitations is triggered, at an *objectively* determined point of discovery: the moment immigration authorities know of the violation *or could have*, through the exercise of diligence typical of law

enforcement authorities, discovered the violation.[1] *See, e.g., United States v. Gomez*, 38 F.3d 1031, 1037 (8th Cir. 1994).

By calling this distinction merely a "contrast" in "language" with no "practical significance," the Government glosses over the fundamental and important differences between the Seventh Circuit's subjective standard and the objective standard the other circuits have established.

First, the choice between an objective standard and a subjective standard in the statute of limitations context frequently equates to a choice between two dramatically different dates of accrual for the statute of limitations. In *United States v. DiSantillo*, 615 F.2d 128 (3d Cir. 1980), one of the cases discussed at length by the Government, the constructive knowledge standard meant that the statute of limitations began to run on March 23, 1970, while the actual knowledge standard meant the statute of limitations began to run six years later, on February 24, 1976. In *United States v. Gomez*, another case cited at length by the Government, the two different standards meant a statute of limitations date of July 2, 1988, versus February 3, 1993. 38 F.3d at 1033.

The same is true here. As the Court of Appeals explained, the difference between actual discovery and the *Government's own view* of constructive knowledge is nothing less than four years and nine months (August 10, 2001 versus April 21, 2006); the difference

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[1] The Government questions whether the Third Circuit has since repudiated its holding in *DiSantillo* and adopted an actual knowledge test similar to the Seventh Circuit's. Br. in Opp. 10-11. Even if true, that would leave the split on this question at four-two rather than five-one, all the more reason to grant certiorari and resolve this disagreement.

between actual discovery and Mr. Gordon's view of constructive knowledge is more than ten years (November 1995 versus April 21, 2006). Pet. App. 2a-3a.

Second, the practical significance of the two different legal standards extends far beyond the particular results in a small set of published appellate court opinions. The Government's argument that there is no practical significance between the two standards is premised entirely on the fact that most of the published appellate court opinions applying the constructive knowledge test have found, based on the particular facts of those cases, that the statute of limitations did not expire before the defendant was indicted. Br. in Opp. at 7-9. The fact remains, however, that those courts were applying a different standard than the court below in this case, and that those different standards are meaningful to courts, defendants, and law enforcement officers.

Indeed, looking only at the results of a few closely-contested, published appellate court opinions says nothing about the real-world impact of the two different standards at issue. The Government does not contest the sheer volume of illegal reentry prosecutions in the United States. Illegal reentry is the second most frequently prosecuted federal offense in the United States. Pet. 11. The Government's narrow view of significance does not address the number of illegal reentry prosecutions that are never brought because the Government realizes that the statute of limitations has passed, or the number of indictments that are dismissed by courts without opinion on statute of limitations grounds. Nor does it recognize the number of border agents and prosecutors who

exercise greater diligence knowing that their negligence or delay will jeopardize a criminal prosecution.

Anecdotally, counsel of record, a former federal public defender in Chicago for less than five years, raised the statute of limitations defense to an illegal reentry prosecution three times in that span. In one case, *United States v. Fernando Munguia-Rangel*,[2] the Government moved to dismiss the indictment after it was proven that Mr. Munguia-Rangel provided his true identity and fingerprints to the INS on an application for citizenship more than five years before he was indicted.[3] No published opinion exists for that case, but the two different standards made the difference. Under the current law in the Seventh Circuit, Mr. Munguia-Rangel's challenge would fail; neither the court nor the Government would have had a reason to dismiss his indictment. In any of the other five circuits, however, his indictment would be dismissed.

Finally, lost in the debate over practical significance is perhaps the most fundamental difference between the objective, constructive knowledge standard and the subjective, actual knowledge standard: the former is supported by law, while the latter is not. The law in the Seventh Circuit effectively eliminates 18 U.S.C. §3282 from the

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[2] *See United States v. Munguia-Rangel*, 03-CR-1142 (N.D. Ill. Apr. 21, 2004) (Order granting Motion to Dismiss and dismissing indictment with prejudice) (Guzman, J.).

[3] The *Munguia-Rangel* indictment was dismissed before the Seventh Circuit Court of Appeals rejected the constructive knowledge standard in *United States v. Are*, 498 F.3d 460 (7th Cir. 2007), and *United States v. Gordon*, 513 F.3d 659 (7th Cir. 2008).

Criminal Code for "found in" prosecutions because it essentially holds that nothing short of the Government's decision to arrest or prosecute the offender will trigger the statute of limitations.[4] Until that point, the Government is free to overlook and condone the alien's illegal presence—without limitation—and thereby prolong the offense indefinitely. The crime can continue for as long as the authorities choose not to enforce the law. Noticeably absent from the Government's brief in opposition is any attempt to justify the Seventh Circuit's subjective standard as reasonable, or even colorable under the language of either the illegal reentry statute or the statute of limitations—let alone correct.

This Court has repeatedly stated its preference for enforcing constitutional rights and criminal laws through objective legal standards. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 154-55 (2004) ("Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest."); *Williams v. Taylor*, 529 U.S. 362, 409-410 (2000) (when determining whether a federal law has been reasonably applied, a "federal habeas court should not transform the inquiry into a subjective one"); *Stansbury v. California*, 511 U.S. 318, 323 (1994) ("[T]he initial determination of custody depends

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[4] The Government takes issue with this characterization of the law in the Seventh Circuit (that nothing short of arrest or a decision to prosecute will trigger the statute of limitations) by pointing out that the Court of Appeals for the Seventh Circuit has yet to definitively resolve whether the statute of limitations begins to run as of the date of arrest or as of the date of actual discovery. Br. in Opp. 6-7. In reality, however, the date of actual knowledge will be the date of arrest in nearly every case.

on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."). Objective legal standards are far easier for courts to administer, and have the benefit of putting both individuals and law enforcement officers on notice of exactly what the law expects of them. Subjective standards, on the other hand, create uncertainties in the law, and often lead to unfair discrepancies from one case to the next. "An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine" subjective feelings. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (citing *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141 (2004), and *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). There is no reason to reach a different conclusion in this context.

Five circuit courts of appeals have interpreted 8 U.S.C. § 1326 and 18 U.S.C. § 3282 in a way that enforces the statute of limitations duly enacted by Congress. The Seventh Circuit Court of Appeals has not. The difference between the objective, constructive knowledge standard and the subjective, actual knowledge standard is clear, and it is significant. The objective standard is easy for courts to apply consistently across cases, and protects aliens from having to defend against acts in the far distant past; the subjective standard results in uncertainty and unfair discrepancies. The objective standard furthers the goals of the statute of limitations by encouraging law enforcement and Government prosecutors to exercise due diligence and timely prosecute criminal conduct; the subjective standard discourages diligence

and excuses negligence, and cuts § 3282 out of the criminal code. Moreover, the objective standard and subjective standard often enough translate into different dates upon which a crime is complete. While those different dates may not always result in an untimely indictment, it can and it has—and it did here.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT

This case remains a suitable vehicle for reviewing the circuit split created by the Seventh Circuit Court of Appeals, even though the court below held that the Government did not have constructive knowledge of Mr. Gordon's presence after his entry at the border, because determining what constitutes constructive knowledge is part of the question presented to this Court for review.

Specifically, the question presented for review is whether the five-year statute of limitations for the crime of being "found in" the United States began to run in 1995 at the time that Mr. Gordon announced his presence and true identity to immigration authorities at the border. Pet. i. This is a question of *law* to be determined *de novo* by this Court based upon the undisputed facts below. *Toussie v. United States*, 397 U.S. 112, 124 (1970) ("The question in this case is not whether the five-year statute applies, but when it begins to run."). The results below are neither binding on this Court nor entitled to deference, and they are plainly wrong. The result in this case depends entirely on the legal standard adopted by this Court.

It is hard to imagine what additional information immigration authorities needed in November 1995 in order to discover Mr. Gordon's illegal presence in the

United States. Mr. Gordon presented immigration authorities with his own "green card," a Government-issued document bearing his true and accurate identifying information—his name, date of birth, alien registration number, fingerprint, and photograph. The green card, on its face, admitted that he was *not a citizen* (and thus might not have permission to enter). He presented it to immigration authorities *at the border*, giving it to agents who have the express duty to ensure that only those people with permission to enter the United States are allowed to enter the United States. Those agents had access to a computer database and lookout book at the border crossing that would have identified Mr. Gordon as a previously deported alien without permission to reenter.

Simply put, reasonable diligence must require more than merely looking at a document presented by a non-citizen at the border and waving him through. It must, at the very least, require those agents to stroke a few keys on a keyboard or flip a few pages in a book to determine if the alien has permission to enter.

The only other appellate court to address the constructive knowledge standard on similar facts has held that the statute of limitations began to run at the moment the alien entered the United States through a recognized port of entry. *DiSantillo*, 615 F.2d at 128. In *DiSantillo*, the defendant was an alien who previously had been arrested and deported from the United States. Once out of the country, he applied for and obtained a visa to enter the United States in his true name after incorrectly stating that he had only been excluded, not arrested and deported. He then entered the United States through a recognized port of entry by presenting his invalid visa bearing accurate

identifying information. The Third Circuit Court of Appeals concluded that the immigration authorities had constructive knowledge of his illegal entry—and that the statute of limitations began to run—at the moment he crossed through the port of entry because "immigration authorities knew of his entry and could have, through the exercise of diligence typical of law enforcement authorities, discovered his violation at that time." *DiSantillo*, 615 F.2d at 135-36.

The Government's citation to *United States v. Acevedo*, 229 F.3d 350 (2d Cir. 2000), for the opposite conclusion is inaccurate. While the defendant in *Acevedo* entered the United States with an authentic but invalid green card, as Mr. Gordon did here, the Second Circuit Court of Appeals did *not* hold, as the Government claims, that a "deportee's presentation of a green card rendered invalid by his prior removal does not charge government with constructive knowledge." Br. in Opp. 12. Rather, the court expressly declined to reach the issue of whether due diligence should have led to his discovery at the point of entry because the defendant did not "suggest that immigration authorities had available any equipment enabling them to conduct the necessary investigation." *Acevedo*, 229 F.3d at 355-56.

Contrary to *Acevedo*, Mr. Gordon has expressly set forth that immigration authorities at the border had access to a database that would have identified him as a previously deported alien. That fact has been uncontested at every stage of the proceeding and it was specifically cited by the district court, Pet. App. 29a, compelling a very different outcome here.

Furthermore, the only other case cited by the Government on this point, *United States v. DeLeon*,

444 F.3d 41 (1st Cir. 2006), also fails to support the conclusion that the Government lacked constructive knowledge of Mr. Gordon's presence. In *DeLeon*, the defendant had been convicted and deported under a false name, though he presented accurate identification when entering the United States at the border. On these facts, the First Circuit Court of Appeals concluded that immigration authorities had no way of knowing that Mr. DeLeon was the same man who previously had been convicted and deported from the United States. As the court explained in a significant passage omitted from the Government's brief: "[T]here can be no finding of lack of diligence *where it is deception by the alien as to his identity that has caused the government not to have knowledge of his presence.*" *Id.* at 52 (emphasis added to portion omitted in Br. in Opp. 12.)

Unlike the defendant in *DeLeon*, it is undisputed that Mr. Gordon was convicted and deported under his true name and alien number, and that the green card he presented at the border contained accurate identifying information. There was simply no deception "as to his identity" that could have prevented the government from gaining knowledge of his illegal presence.

In short, the undisputed facts of this case squarely and clearly present this Court with the opportunity to resolve the circuit split created by the Seventh Circuit when it held that constructive knowledge of an alien's illegal presence in the country is irrelevant to the running of the statute of limitations. If the Seventh Circuit is correct, then Mr. Gordon's indictment is timely. If the five other circuits are correct, however, and the constructive knowledge standard applies, Mr.

Gordon's indictment must be dismissed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW M. SHORS
DAVID J.L. MORTLOCK
GEOFFREY M. WYATT
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

GABRIEL BANKIER PLOTKIN
Counsel of Record
DANIEL M. FEENEY
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, IL 60601
(312) 263-3700

Counsel for Petitioner

September 10, 2008